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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSE JESUS ALCALA, Appellant.	2 CA-CR 2007-0161 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054810

Honorable Richard S. Fields, Judge

AFFIRMED IN PART
VACATED AND REMANDED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Jose Jesus Alcala was convicted of a number of offenses stemming from a traffic accident he caused in November 2005, including two counts each of assault and aggravated assault of a minor under fifteen; criminal damage; leaving the scene of an accident involving death or serious physical injury; aggravated driving under the influence of an intoxicant (DUI) with a revoked, suspended, or restricted license; and aggravated driving with an alcohol concentration of .08 or more with a revoked, suspended, or restricted license.[1] He was convicted of two additional counts of aggravated DUI for an incident that occurred after this accident. The trial court sentenced Alcala to a partially aggravated, 12.5-year prison term for aggravated assault of a minor under fifteen and to concurrent, lesser terms on all other counts but one. For leaving the scene of an accident, the trial court imposed a consecutive, presumptive term of 3.5 years.

¶2 On appeal, Alcala argues that the trial court erred in instructing the jury and in considering his immigration status as an aggravating circumstance at sentencing. For the reasons set forth below, we affirm Alcala's convictions and remand for resentencing on counts four and six.

Factual and Procedural Background

¶3 We view the facts in the light most favorable to upholding the convictions and resolve reasonable inferences from the evidence against the defendant. *State v. Cox*, 214

[1]Alcala was also found guilty of two counts in the indictment that the trial court later dismissed as "duplicative."

Ariz. 518, ¶ 2, 155 P.3d 357, 358 (App. 2007), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). On November 24, 2005, Alcala was driving a sports utility vehicle (SUV) when he ran a stop sign and crashed into the side of a minivan. All three people in the van sustained significant injuries. Four-year-old Alyssa suffered a brain injury and was placed on a ventilator for several days during her month-long hospital stay. Her grandfather, the van's driver, suffered broken bones and other internal injuries and died in the hospital nearly a month after the accident. Alyssa's grandmother suffered a shattered elbow and broken pelvis.

¶4 A witness who stopped to render assistance saw Alcala approach the minivan and noted that the driver's-side door of the SUV was open. Alcala, who had a gash on his forehead and blood on his face, then fled the scene of the accident, leaving the SUV behind.

¶5 Police stopped Alcala less than four hours later as he was driving another vehicle. The injury on his forehead was still apparent. He admitted drinking alcohol earlier and consented to having his blood drawn. A retrograde analysis of the blood sample indicated Alcala had had a blood-alcohol concentration of approximately .233 at the time of the accident.

¶6 After being charged, convicted, and sentenced as noted, Alcala filed this appeal.

Discussion

Jury Instruction

¶7 Alcala contends that the court erred in instructing the jury as to the intent required to prove aggravated assault. The court gave the following instruction:

> The crime of aggravated assault requires proof of the following two things:
>
> 1. That the defendant recklessly caused physical injury to another; and
>
> 2. The assault was aggravated by the following factors:
>
> A. The defendant used a deadly weapon or dangerous instrument; or
>
> B. The defendant caused serious physical injury to another; or
>
> C. The defendant is eighteen years of age or more and commits the assault upon a child the age of fifteen years or under.

Alcala contends the instruction, by specifying only the mental state of recklessness, "failed to instruct the jury that the offense . . . requires knowledge and intent and it substantially lessened the burden of proof required under the statute." By not informing the jury that assault could also be committed "intentionally" or "knowingly," Alcala concludes, the court "denied [him] a fair trial on th[e] issue."

¶8 When, as here, a party has not objected to a jury instruction, we review the instruction given only for fundamental error, and we will reverse only if the error was of

such dimension that it deprived the defendant of a fair trial.[2] *See State v. Moody*, 208 Ariz. 424, ¶ 193, 94 P.3d 1119, 1161-62 (2004). A trial court is under no obligation to instruct on matters neither raised by the parties nor sustained by the evidence. *State v. Williams*, 132 Ariz. 153, 157, 644 P.2d 889, 893 (1982). Nor is a court obligated to give a jury instruction if it is an incorrect statement of law. *State v. Axley*, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982). Whether a jury instruction accurately states the law is a question we review de novo. *State v. Morales*, 198 Ariz. 372, ¶ 4, 10 P.3d 630, 632 (App. 2000).

¶9 The state proves aggravated assault under A.R.S. § 13-1204 if it establishes that the accused committed simple assault, as defined by A.R.S. § 13-1203, against a minor under fifteen, or with a deadly weapon, or in such a way as to cause serious physical injury to the victim. § 13-1204(A)(1), (2), (6). The definition of assault, in turn, includes "[i]ntentionally, knowingly or recklessly causing any physical injury to another person." § 13-1203(A)(1). Recklessness is a culpable mental state in which "a person is aware of and consciously disregards a substantial and unjustifiable risk" that a reasonable person would observe. A.R.S. § 13-105(9)(c). The mental state with which one commits simple assault determines, in part, the severity of the crime. *See* § 13-1203(B). Intentional or knowing

[2]Although the record on appeal does not contain any transcripts relating to jury instructions, Alcala has not alleged, nor does the record indicate, that he objected to the instructions given by the trial court or that he requested instructions the court refused to give. Appellants have a duty to ensure that the record on appeal contains any documents necessary to their argument, and we will not speculate on proffered jury instructions not present in the record. *State v. Kerr*, 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984).

assault is class one misdemeanor, whereas reckless assault is a class two misdemeanor. *Id.* But any level of assault will serve as a predicate for aggravated assault. *See State v. Martinez*, 196 Ariz. 451, ¶ 43, 999 P.2d 795, 806 (2000) (person can commit aggravated assault recklessly).

¶10 Here, the evidence reasonably supported an instruction on reckless aggravated assault. Alcala drove a vehicle while under the influence of alcohol, consciously disregarding the substantial risk of physical injury his conduct posed to others, and a four-year-old child was severely injured as a result. The state did not introduce evidence that Alcala intended to crash into the victims' minivan or that he knew the accident would happen given the way he was driving. Thus, the trial court did not err by instructing the jury on reckless assault alone, and the instruction the court gave accurately stated the law.

¶11 Moreover, Alcala's contention that aggravated assault "requires knowledge and intent" is a misstatement of the law. Section 13-1203(A)(1) specifies that assault occurs when a defendant inflicts injury "[i]ntentionally, knowingly *or* recklessly"; hence, the state proves the offense by establishing any one of these culpable mental states. (Emphasis added.) Furthermore, contrary to Alcala's assertion, the failure to instruct the jury that an assault could be committed intentionally or knowingly did not "lessen[] the burden of proof." To find a defendant guilty of any crime, a jury must find every element of the charged offense proven beyond a reasonable doubt. *State v. Ramsey*, 211 Ariz. 529, ¶ 18, 124 P.3d 756, 763 (App. 2005). Alcala was not deprived of a fair trial simply because the

state did not attempt to convict him of a different form of assault with different elements. We therefore find no error, fundamental or otherwise, in the court's instruction.

Sentence

¶12 Alcala also contends the trial court erred "in finding as an aggravating circumstance that [he] was in the United States without documentation and in considering that fact to aggravate [his] sentence." After Alcala waived his right to have the jury find aggravating factors,[3] the trial court imposed a partially aggravated term of 12.5 years for the aggravated assault against Alyssa. In support of this sentence, the court found the following aggravating circumstances: (1) the financial and emotional harm Alcala caused the victims, (2) his failure to benefit from previous rehabilitative efforts, (3) his illegal presence in the United States, and (4) his blaming the victim for the collision. The court determined these aggravating factors outweighed the two mitigating factors also found by the court.

¶13 The state alleged Alcala's illegal presence in the country as an aggravating factor in its May 2006 notice, and the court appears to have concluded Alcala was present illegally based on information contained in the presentence report. The report provided, in relevant part:

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[3]Alcala contends the scope of his waiver was limited to aggravating factors concerning "financial and emotional harm to the victim." Yet the record reveals no such restriction was specified. After the jury returned its verdicts, the court and counsel discussed whether to retain the jurors to find aggravating factors. Defense counsel then stated, "I've talked to [Alcala] about his options[,] whether to go ahead with the jury trial as to the aggravating factors, and at this point he wishes to waive." The court accepted this waiver and excused the jury with no objection from counsel.

> Immigration Customs Enforcement records state the defendant was "removed/deported/excluded on September 9, 2003 as an alien present in the US without being admitted. There is no record of a legal re-entry. He is amenable to arrest for violation of the Federal Criminal Statutes and/or for Immigration Act Violations."

Defense counsel did not object to this portion of the presentence report before or during the sentencing hearing. The only reference to Alcala's immigration status at the hearing was defense counsel's statement that "[Alcala]'s been here illegally, but he has been working very, very hard while he's been here legally [sic]."

¶14 We will not disturb a sentence that is within the statutory limits absent a clear abuse of discretion. *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001). "If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances." A.R.S. § 13-702(D); *see also State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005) (sentencing range established for Sixth Amendment purposes when jury finds or defendant admits single aggravating factor).

¶15 Here, Alcala was exposed to an aggravated sentencing range as a result of the trial court's properly finding financial and emotional harm to the victim as an aggravating factor. *See* § 13-702(C)(9). He does not dispute having waived his right to a jury trial on this factor or argue that it was improperly found by the trial court. Consistent with *Martinez*, the trial court was therefore free to find additional aggravating factors by a preponderance of the evidence.

¶16 Section 13-702(C)(24) allows a court to consider as an aggravating factor "[a]ny . . . factor that the state alleges is relevant to the defendant's character or background." A court may find an aggravating factor based on information in a presentence report. *State v. Moreno*, 153 Ariz. 67, 70, 734 P.2d 609, 612 (App. 1986). Objections to information in a presentence report must be made before the sentencing hearing. Ariz. R. Crim. P. 26.8(a). A defendant who fails to object waives the right to challenge the report on appeal. *State v. Baker*, 126 Ariz. 531, 533, 617 P.2d 39, 41 (App. 1980). As noted, Alcala did not challenge the presentence report and, in fact, conceded at sentencing that "he's been here illegally."

¶17 The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to *any person within its jurisdiction* the equal protection of the laws." (Emphasis added.) As our nation's highest court has emphasized, that protection

> extends to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.

Plyler v. Doe, 457 U.S. 202, 215 (1982). Because Alcala is thus entitled to the equal protection of our laws, we would not hesitate to remand this case for a new sentence had the trial court found Alcala's national origin or citizenship status itself as an aggravating factor. *See, e.g., United States v. Borrero-Isaza*, 887 F.2d 1349, 1355, 1357 (9th Cir. 1989) (vacating sentence based partially on defendant's national origin).

¶18 But, as *Plyler* also implies, a noncitizen residing in this country unlawfully has a duty, no less than a United States citizen, to abide by state and federal laws. By entering the country unlawfully more than once, Alcala repeatedly violated the laws of the United States. *See* 8 U.S.C. § 1325 (criminalizing unlawful entry by person not a United States citizen). And, just as a court may consider a history of law-abiding behavior as a mitigating factor in determining a defendant's sentence, *State v. Thurlow*, 148 Ariz. 16, 19-20, 712 P.2d 929, 932-933 (1986), it may also consider a defendant's history of disregarding laws as an aggravating factor, *State v. Ellis*, 117 Ariz. 329, 334, 575 P.2d 791, 796 (1977). Indeed, our state's sentencing structure suggests that our legislature views prior criminal behavior as among the most important factors in determining appropriate punishment for a crime. *See* A.R.S. § 13-604 (providing increased sentencing ranges for defendants committing offenses with prior felony convictions).[4] Thus, it was well within the trial court's

[4]Nor does Alcala enjoy any immunity from those principles merely because the immigration laws he has broken are politically controversial. It is not the role of the judicial branch to pass upon the wisdom of our nation's laws unless those laws are unconstitutional, and Alcala has not argued that the immigration laws he disregarded violate the United States Constitution.

discretion to consider prior criminal behavior as an aggravating factor in determining Alcala's punishment. *See* § 13-702(C)(24) (court may consider as aggravating factor "[a]ny . . . factor that the state alleges is relevant to the defendant's character or background").

¶19 Here, the record suggests that the trial court considered Alcala's immigration status as an aggravating factor only to the extent that it represented evidence of disregard for the law, not as a pretext to punish Alcala for his national origin or lack of citizenship. Nor did Alcala present any facts demonstrating that his motivations for repeatedly entering the country unlawfully were especially compelling or benign—factors the trial court would have been entitled to consider in determining how much weight to place upon Alcala's violation of the immigration laws. *See* A.R.S. § 13-702(D)(6) (court may consider in mitigation "[a]ny other factor that is relevant to the defendant's character or background"). Accordingly, the court did not abuse its discretion in relying on this factor, among several others, as a basis for imposing an aggravated term of imprisonment.

¶20 Finally, as the state has acknowledged, Alcala was subjected to illegal sentences on two counts of misdemeanor assault. The trial court sentenced him to six months in jail for each offense—a lawful sentence only if the offenses were class one misdemeanors. *See* A.R.S. § 13-707(A)(1). But the jury was instructed only on "reckless" assault, making the convictions class two misdemeanors pursuant to § 13-1203(B), and carrying a maximum term of incarceration of four months. § 13-707(A)(2). Accordingly, we vacate the sentences imposed on counts four and six and remand for the trial court to

resentence Alcala within the lawful sentencing range. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (illegal sentence is fundamental, prejudicial error).

¶21 For the foregoing reasons, we affirm Alcala's convictions, but vacate his sentences on counts four and six and remand for a new sentencing on those counts. Alcala's sentences on the remaining counts are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge